

**FROM LIVING LAW TO GLOBAL
LEGAL PLURALISM:
RETHINKING TRADITIONS FROM A CENTURY
OF WESTERN SOCIO-LEGAL STUDIES**

.....

Roger Cotterrell*

ABSTRACT

This paper notes certain key landmarks in the modern history of Western sociology of law. Taken together, these map developments that have given socio-legal studies some of its most influential and powerful theoretical ideas. But the paper asks how far such inherited ideas – and the research traditions they represent – are still useful in confronting the pluralistic, globalised and fragmented regulatory systems that proliferate today. How far can sociology of law maintain continuity with its past? This paper argues that it can maintain a strong continuity, but also that it must discard (or radically rework) some of its central inherited ideas that are coming to seem anachronistic in the face of contemporary socio-legal developments: especially developments relating to cultural pluralism, legal pluralism and transnational law.

Keywords: Sociology of law; global legal pluralism; Japan; Ehrlich; Weber; cultural pluralism; transnational law; Islamic law.

1. INTRODUCTION: WEBER AND EHRLICH

We should surely celebrate the fact that modern empirically-oriented sociology of law is now a century old. In Japan and in the main Anglophone countries the publication in 1913 of Eugen Ehrlich's *Grundlegung der Soziologie des Rechts* has been seen as an outstanding

* Anniversary Professor of Legal Theory, Queen Mary University of London, UK. This article originated as a paper presented at a seminar at Kobe University Graduate School of Law on April 11th 2015. I am grateful to Professor Hiroshi Takahashi and his colleagues for facilitating this event. A translation into Japanese, by Hiroshi Takahashi, was published in (2015) 1 *Ho to Shakai Kenkyu (Japanese Law & Society Review)* 161-84.

early intellectual landmark for sociology of law – a source of some of its basic concepts and methods – and, in some sense, a foundation of all subsequent thinking in this field.

Ehrlich's work has, however, never had the centrality in Western socio-legal studies that it surely had for a long time in Japanese sociology of law.¹ Theoretical and methodological resources in Anglophone sociology of law up to the present have come from many sources and, among classic social theorists, Max Weber can probably be seen as having had the most powerful and enduring influence, Marx's insights having fallen into neglect since the 1980s. The Weberian influence has been important in shaping socio-legal ideas about law and economic development, the legal structures of capitalism, the character of modern formal legal rationality and the nature of the modern bureaucratic *Rechtsstaat*.

Looking back over a century of Western research, Weber surely appears as the dominant classical socio-legal theorist of the highly developed capitalist state; a state structured by law, governing socio-economic relations through law, and entirely monopolising the production, interpretation and enforcement of law. Weber wrote at a time (the dawn of the twentieth century) when, in the West, the state appeared finally to have triumphed over all potentially competing sources of law: law would mean, for the foreseeable future, *state law*. The state's claim to monopolise the legitimate use of force seemed fulfilled in the modern West, state law being the technical means of harnessing that force to the purposes of government. Weber's thinking surely reflects the fact that he worked in an increasingly powerful Germany: a nation still celebrating its new political unity and its emergence as a great capitalist power; possessing a vast state apparatus and confident in its regulatory capacity and directive powers. Of all the classic social theorists it is Weber whose work most strongly conveys a sense of the inevitable domination of society and culture by the state and its law.

In this context, Ehrlich's promotion of an idea of 'living law' – authoritative social norms as contrasted with the norms by which state agencies decide disputes² – is an act of *constructive subversion* – a challenge to the state's omniscience in regulatory matters and, in particular, to that of jurists serving the state. The reason why the idea of living law had limited resonance

¹ M. Murayama, 'Kawashima and the Changing Focus on Japanese Legal Consciousness: A Selective History of the Sociology of Law in Japan' (2013) 9 *International Journal of Law in Context* 565-89.

² Ehrlich's concept is no doubt better known among Japanese legal sociologists than among most Anglophone socio-legal scholars. I take it particularly to refer to important social norms widely accepted in a particular population, treated within that population as authoritative in governing social relations, and culturally validated whether or not they are recognised by state authorities as law.

in the leading Western nations (perhaps in contrast to Japan) was surely that jurists in the most powerful Western states tended to assume that state law was substantially integrated with national socio-economic and cultural conditions. State officials and lawyers could assume that legal-political development and socio-economic development followed broadly parallel paths. So, in France, Emile Durkheim could write of the state as a 'brain' having the responsibility to 'think' on behalf of society as a whole, providing guidance for it but also expressing and reflecting the moral conditions of social solidarity.³ And for Weber the progress of the modern idea of law as a 'rational technical apparatus'⁴ seemed to parallel the ongoing rationalisation of most other aspects of Western life.

Ehrlich's sociology of law, by contrast, suggests a potentially serious divorce between state law and social norms, or between politics and culture. It is surely no accident that he developed his ideas in what was then one of the most *unstable* of Western political societies, the crumbling Austro-Hungarian Empire, where the political structure of the imperial state was unable to embrace all the diverse local cultures of the regulated populations. As a loyal jurist, Ehrlich intended his sociology of law largely as a *warning* to the state and to his fellow state jurists, a warning that state law could be incompatible with the cultural expectations and experience of the populations it sought to regulate, and that this situation posed the risk of state law being ineffective, irrelevant, oppressive or unpredictable in its operation.

Thus, where the idea of living law or similar ideas had influence in the early development of Western sociology of law, this was largely because living law was presented as an inevitable (or necessary) *control* on what state law could (or should) do. In contrast to Weber's sociology of state law, Ehrlich's ideas suggest an embryonic sociology of legal cultures subverting the idea of the all-powerful state having unlimited regulatory capabilities.

This paper is concerned with ways in which these contrasting models of law have related to each other over the past century and, in particular, with their relation today. It can be said that the career of the living law concept (and similar ideas) has paralleled the career of the state as law-maker. When the state has been seen as supremely strong the idea of living law has had little purchase except among those who resent this strength; when the regulatory capacities of

³ R. Cotterrell, *Emile Durkheim: Law in a Moral Domain* (1999) 154-7.

⁴ M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1968) 895.

the state (or the appropriateness of its regulation) have been put into doubt the idea of living law (or some related idea) has been practically important.

I shall argue, however, that the concepts that underpin both the state law focus and the living law focus are becoming unstable. The growth of new types of law that are not tied securely to the state undermines any equation of law and state law. And the growth of transnational socio-economic networks that produce their own regulation indicates the need for more precise concepts than living law: new concepts are needed to distinguish the variety of social contexts in which regulation arises, and in which it claims authority and seeks acceptance. Sociology of law needs new ways to conceptualise ‘the social’.

So, this paper will suggest that foundational ideas of sociology of law – its typical assumptions about law, state and society – need rethinking – and that the concept of living law may, after a century of productive application, have reached the limit of its usefulness.

2. LIVING LAW: A PROBLEM FOR STATE LAW?

Ehrlich saw living law as a practical and inevitable control on what the law of the state could realistically be expected to achieve. And what lay behind this vision was the idea that, while society’s self-regulation is fundamental, the state is only a derivative regulator, parasitic for its regulatory success on the conditions that society provides for state regulation to operate. Hence, Ehrlich’s anarchistic claim that one ‘might reasonably maintain that society would not go to pieces even if the state should exercise no coercion whatever’.⁵ Such a claim could be made polemically but was not likely to be taken seriously by Western jurists who were content to leave it to sociologists to study social norms and saw no reason to inform themselves about such studies. Jurists could assume that the main problem for the law of powerful Western states was not to defend it from bizarre charges of social irrelevance but to make it technically sophisticated, doctrinally consistent, convincingly rational, and the embodiment of social values recognised by the jurists themselves. All of these were matters that jurists could address without seeking any help from social scientists.

⁵ Ehrlich, *op. cit.*, 71.

Although *empirical* research in sociology of law began much earlier in Japan, it did not develop significantly in Western countries until the 1960s. Until that time European sociology of law remained a largely *theoretical* subject – perhaps the most enduring contribution to it coming from scholars such as Georges Gurvitch who combined a focus on social theory with a background in philosophy.⁶ Until empirical evidence began to be collected systematically about the ‘gap’ between the aims of state law and its actual effects in society, sociology of law could be treated as a *speculative* social science, with little attention given to it by lawmakers or jurists. As is well-known, it was in the United States that Western empirical sociology of law – as ‘law and society’ research – began to establish itself most notably, after the mid-point of the 20th century. As this empirical focus became prominent, theoretical efforts to develop a sociological concept of law seemed to decline.

These theoretical efforts had characterised not only the work of the pioneers (e.g. Weber, Durkheim, Ehrlich and Leon Petrażycki) but also that of important later contributors influenced by them such as Gurvitch, Nicholas Timasheff and Pitirim Sorokin.⁷ The changed balance away from theory and towards empirical research from the second half of the 20th century is important. Before that change, juristic assumptions about the power and effectiveness of state law were little troubled by theoretical arguments about the significance of living law because hardly any empirical research had been done to show this significance. So, juristic legal theory (focused on state law) and socio-legal theory (derived from the work of scholars such as those mentioned above) could exist in entirely separate intellectual worlds. Hardly any influence of sociology of law on juristic thought occurred. Far from ideas of living law actually exerting some control on state law-making or judicial practice (as Ehrlich must have hoped might occur), an English jurist C. K. Allen could dismiss Ehrlich’s sociology of law as ‘megalomaniac jurisprudence’⁸ – in other words, a futile and impractical attempt to study all human social life and present it as an undifferentiated pile of data for juristic consideration.

In the second half of the 20th century as empirical sociology of law developed in Western countries, understandings in it of the relationship between state law and living law surely

⁶ See e.g. Gurvitch, *Éléments de Sociologie Juridique* (1940); Gurvitch, *L’Expérience Juridique et la Philosophie Pluraliste du Droit* (1935).

⁷ See e.g. R. Cotterrell, ‘Petrażycki and Contemporary Socio-Legal Studies’ (2015) 11 *International Journal of Law in Context* 1-16, at 5-7 (on Gurvitch, Timasheff and Sorokin).

⁸ C. K. Allen, *Law in the Making*, 7th edn. (1964) 32.

changed greatly.⁹ Comparisons between ‘law in the books’ (the precepts of state law) and ‘law in action’ (the social effects or consequences of this law) were made easier through expanding programmes of empirical research. Such developments were influenced by (and to some extent influenced) new ambitions in leading Western countries to use state law to steer and shape society and to respond to political imperatives to engineer essential socio-economic change.

From the 1960s and 1970s in Anglophone nations and elsewhere, state law was used (differently in various countries) to attack racial and sex discrimination (and, later, other forms of discrimination), to build welfare structures and shape welfare rights, to steer economies, to attack poverty and the social causes of crime, to uproot traditional restrictive practices and privileges, and to protect and promote aspects of national culture. In this context, one might see living law (and more broadly, existing social norms, conditions and attitudes) as presenting a set of *problems* for state law to solve. Living law might be seen in this context as an object of state intervention, sometimes a target for attack through state law.

In this perspective the idea of living law as a control on the operation of state law is turned on its head. The state is assumed to have the power to regulate; what are required are techniques to make it possible to recognise and overcome obstacles to law’s effectiveness. Much socio-legal research was directed to discovering and addressing such obstacles. It could be interesting to compare this research development with the change in ideas about living law that seems to have occurred in very different circumstances in Japan, as the influence of Izutaro Suehiro’s thinking about the relation of state to living law gave way to that of Takeyoshi Kawashima.¹⁰

The era of the activist state promoted, in Western socio-legal studies, a wealth of research about the mechanisms of state law – on police, administrative and enforcement agencies, legal professions, judicial decision-making, citizens’ access to justice, and legislative processes. It could be called the period of *state optimism* – a brief period animated by a sense that, if the right techniques could be devised and used with adequate knowledge of socio-economic conditions, significant social change (and a greater realisation of desirable social

⁹ Although the term living law was relatively rarely used in the literature.

¹⁰ Murayama, *loc. cit.*, 570; Y. Matsumura, ‘The Works of Takeyoshi Kawashima’ (1988) 22 *Law and Society Review* 1037-41.

values such as equality, democracy and liberty) could be brought about through law. However, I think that one of the most important effects of the proliferation of empirical socio-legal research was to encourage, very quickly, a growing disillusionment about the state's capabilities. Research reporting regulatory failure or unintended consequences of law soon accumulated, and critiques, from the 1980s, of juridification, or excessive legalisation, of social spheres¹¹ have been widely influential.¹²

It is surely significant that some of the most powerful of these critiques have been informed by perhaps the most sophisticated theory in contemporary sociology of law – Niklas Luhmann's autopoiesis theory. This theory in no way denies law's important contribution to the specific character of complex, functionally differentiated modern societies, but its thrust is to warn incessantly of the dangers of 'over-extension' of law, and it does so in ways that encourage a politically conservative view of law's social tasks. The perceived danger of over-extension is not here seen as arising from recalcitrant living law; it is seen as resulting from limitations *built into law itself* as a communication system or discourse. While early sociology of law (e.g. Gurvitch) sometimes developed new concepts of law to show law's regulatory potential *far beyond* what jurists recognised, Luhmannian sociology of law conceptualises law in a way that defends a strictly limited (although vital) place for it in society, more or less consistent with conservative juristic understandings of law's practical scope.

Alongside this particular resurgence of theory it is easy to point to general socio-legal developments that indicate great challenges for the state in governing through law. The rest of this paper focuses on these developments and suggests that they are beginning to pose a challenge also to ways of thinking that have been familiar in sociology of law from its beginnings – about 'society' as the object of legal regulation, and the state as creator of law

¹¹ G. Teubner, ed., *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (1987); and see e.g. H. S. Aasen, S. Gloppen, A.-M. Magnussen and E. Nilssen eds., *Juridification and Social Citizenship in the Welfare State* (2014).

¹² Including in Japan: see e.g. S. Hirowatari, 'Post-war Japan and the Law: Mapping Discourses of Legalization and Modernization' (2000) 3(2) *Social Science Japan Journal* 155-69.

3. CHALLENGES FROM CULTURAL PLURALISM

In Britain and many other European countries much debate now centres on the challenges that multiculturalism, or cultural pluralism, poses for state law. Very recently the British Home Secretary¹³ has announced an inquiry to be conducted on behalf of the UK government into ‘the application of Shari’a law in England and Wales’. The announcement was provoked by the view that, as the Home Secretary put it, ‘we know enough to know we have a problem, but we do not yet know the full extent of the problem. For example, there is evidence of women being “divorced” under Shari’a law and left in penury, wives who are forced to return to abusive relationships because Shari’a councils say a husband has a right to “chastise”, and

Shari’a councils giving the testimony of a woman only half the weight of the testimony of a man.’¹⁴ In fact, substantial empirical research has been done on the operation of Shari’a law principles among Muslim minorities in Britain and other European countries, but not enough systematic data exists to provide an entirely clear picture.

This is an area in which research on living law rooted in the culture (especially traditions and beliefs) of a particular religious minority is now seen to be urgently required. It is likely that in important respects dispute resolution in Shari’a councils works well and is widely accepted because it responds to the cultural expectations and understandings of the populations it serves. For these populations the norms applied may fully deserve respect as law and may sometimes be more meaningful and relevant in everyday life than much state law.

However, Shari’a-influenced living law may also sometimes appear inconsistent with what are seen as underlying values of state law; it may seem to undermine this law insofar as state law purports to represent these values as universally defended in its jurisdiction. Controversy centres on the jurisdiction of Shari’a councils over religious marriages and divorces and associated property matters – making decisions lacking the binding force of state law but having popular acceptance among Muslims as living law. As the statement quoted earlier suggests, it is the position of women in Shari’a that is most problematic from the perspective of state law, which now claims to be based on a universal value postulate of gender equality.

¹³ Responsible *inter alia* for UK citizenship and security, and policing and internal affairs in England and Wales.

¹⁴ T. May, ‘A Stronger Britain, Built On Our Values’ <https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values> (March 23rd 2015).

Cultural pluralism is a normal, inevitable and, one might say, necessary and desirable condition of large, highly developed, contemporary political societies. As flows of population around the world continue, recipient societies are enriched and national cultures reinvigorated by newcomers bringing with them different cultural inheritances – ‘imported’ varieties of living law. Ultimately state law’s capacity to direct this process of import of foreign culture is limited. So, it can be asked: is this living law (i) a *control* on state law (following Ehrlich) so that state law must accommodate it or (ii) a *problem* for state law to attempt to remove using well designed techniques? I think it is neither, although attempts have been made to think of it in both of these ways.

For example, as regards *accommodation* by state law to living law, the idea of ‘cultural defences’ in criminal law and other legal fields has been invoked in some Western legal systems.¹⁵ According to this idea it could be appropriate in certain cases for evidence of relevant features of the particular minority culture of an offender to be admitted in court to help to explain the motivation of acts done; these cultural factors might then sometimes be taken into account as *mitigation* in the court’s sentence. However, the risk of uncontrolled subjectivity in cultural defences and their potential incompatibility with orthodox conceptions of the rule of law make it unlikely that they could ever be free of fierce controversy.

As regards the second approach (treating the living law of cultural pluralism as *a problem to be solved* by appropriate state law techniques), this can be seen in efforts to make cultural pluralism more or less invisible in the public realm by determined enforcement of apparent cultural uniformity. Hence the attack by state law in several continental European countries on symbols of cultural pluralism such as the Muslim female veil, prohibiting the wearing of it in public places.¹⁶ But some such efforts to employ state law seem to have been made in forgetfulness of much research on the resilience of culture – especially those aspects of it rooted in basic beliefs.

How should sociology of law address cultural pluralism? How, in these conditions, is the relationship between state law and living law to be worked out? As noted above, it seems that

¹⁵ See generally M.-C. Foblets and A.D. Renteln eds, *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence* (2009).

¹⁶ See e.g. A. Ferrari and S. Pastorelli eds, *The Burqa Affair Across Europe: Between Public and Private Space* (2013).

one approach would be to accommodate state law to living law; the opposite one would be to force living law to yield to state law. Neither seems satisfactory. Neither recognises the complexity and subtlety of the interactions involved between state law and social norms. I think the difficulty here is caused by the dualistic, confrontational, either/or way in which the issues are presented, and this dualism is surely a legacy of Ehrlich's sociology of law.

In this scenario, on one side are all the norms (treated as an undifferentiated category) by which state courts and other authorities decide disputes (*Entscheidungsnormen*). On the other side is living law (*lebendes Recht*), a conceptually undifferentiated mass of norms existing in social associations of innumerable kinds. But the social – the social environment in which state law operates – needs to be understood with more conceptual subtlety: the idea of cultural pluralism implies *many* ways in which the social is differentiated – for example, by religious belief, by customs and traditions, by language, by geographical factors, by shared history and collective memory, by emotional allegiances and rejections, and by economic conditions.¹⁷

A uniform concept of living law can hardly recognise these very varied criteria of distinction in the social; nor does it suggest in itself the contrasting kinds of attitudes to regulation and problems of regulation that may be associated with them. State law may face different problems in regulating social relationships founded on traditions and customs, as compared with those centred on fundamental values or beliefs, or on emotional attachments or rejections, or on shared economic necessities or opportunities.

The above analysis indicates some reasons why the concept of living law may no longer be useful, at least in Western societies, to sociology of law. Sociology of law can make more progress if it replaces the idea of living law with that of law rooted in *different types* of communal relations and if it then distinguishes carefully these types (as Weberian ideal types) and asks what general regulatory problems and needs each of the types might present. As a first step in this project it would be necessary to distinguish:

¹⁷ Shari'a issues in Britain are typically addressed in popular and public debate almost entirely in terms of a dualistic state-law/living law dichotomy, instead of with a focus on the complexity and variety of cultural relations – a focus that would distinguish variables relating to belief and ultimate values, economic situation, affective (national, ethnic, etc.) allegiances, and the experience of co-existence in established environments. For this latter approach see R. Cotterrell and A.-J. Arnaud, 'Comment penser le multiculturalisme en droit?' (2007) 23(2) *L'Observateur des Nations Unies: Revue de l'Association Française pour les Nations Unies (Section Aix-en-Provence)* 7-26.

- relations of community based on shared *ultimate values or beliefs* (which might be religious beliefs, but could equally be fundamental secular values such as human rights or human dignity),
- those based on shared or convergent economic or other *instrumental projects*,
- those grounded in tradition and custom or the mere fact of co-existence in an established *shared environment* (whether a geographical environment, a linguistic one, or one historically shaped by shared experience or collective memory),
- and those based on *affective ties* (affection, emotional attraction or rejection, love, hatred).

Evidence from research in sociology of law and comparative legal studies might then suggest that each of these ideal (pure) types of communal relations presents, in general, significantly different regulatory problems and possibilities.¹⁸ But, in reality, these types will not exist in isolation but will be combined in complex ways; these combinations make what could be called networks of community, or communal networks. They include what Ehrlich thought of as social associations. But communal networks can be big or small: as small as the relationship between two contracting parties; as large as a nation, or a transnational community of religious believers such as the members of the world-wide Catholic Church.

I have developed this idea of communal networks based on ideal typical communal relations extensively elsewhere and have applied it in many socio-legal contexts.¹⁹ I think that this analytical framework offers concepts more precise than the all-embracing idea of living law. Using such an approach makes it possible to avoid the unreal either/or conundrum of a confrontation between state law and living law in cultural pluralism. Using the concept of communal networks we can claim that all law *including state law* arises in such networks, because the national political society is itself a (complex) example of such a network. The

¹⁸ For example, instrumental (e.g. contract, commercial) relations have often been said to be easier in general to shape through state law than social relations based on ultimate values or beliefs; purely emotional relations may, for a range of reasons, be hard to regulate.

¹⁹ R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006); Cotterrell, *Living Law: Studies in Legal and Social Theory* (2008) chapters 2, 17, 18, 19, 20 and 21.

problem for sociology of law is then not to work out the relationship between state law and living law, but to analyse how law is produced in many different kinds of communal networks and how these various networks interact. Thus, the national political society (Britain, Japan), as a communal network, is composed of, but also must integrate and co-ordinate, many other communal networks within it.

Therefore, state law as the law of the national political society has to *respect and draw sustenance from* forms of regulation produced in the numerous communal networks within this society; but it must also *guide and co-ordinate* the regulation of these networks to ensure the overall integrity of the national political society.

When state law interacts with the legal structures, expectations and aspirations of particular minority groups, what legal sociologists should see is the interaction (and potential conflict) between different communal networks, each producing its own ‘law’ and its own legal expectations and demands. What really exists is not the dualism of state law versus living law, but a natural *regulatory pluralism* that mirrors cultural pluralism. This is surely the condition – not to be regretted but to be welcomed as a challenge for legal sociologists – that now exists generally in most – perhaps all – large, developed, modern societies.

All of this may suggest that the formula ‘law and society’ which has long defined the focus of sociology of law should generally be avoided. It is misleading insofar as it seems to set ‘law’ and ‘society’ against each other, as two distinct monolithic phenomena. Much of sociology of law has been concerned to study the ‘impact’ of law on society, or the ‘gap’ between law and society, or the ‘influence’ of society on law. But a view of law as existing in and created in communal networks avoids these crude oppositions. It suggests, indeed, that even the concept of ‘society’ might now be of limited use²⁰ for sociology of law and a concept of social relations of community might be more useful – because this latter concept can recognise explicitly the diversity of types of these relations and how law reflects and grows out of them.

An approach that views law as located and created in communal networks would reject the idea of society as an entity to which law must relate. Instead it would emphasise different kinds of social relations that can be thought of as relations of community insofar as they rely

²⁰ Cf. Z. Bauman, *Society under Siege* (2002) 41: ‘Among many conceptual keys once deployed by sociology... but now falling out of use... “society” is the first term of the sociological vocabulary to go...’.

on a degree of mutual trust and have some stability and endurance, and it would see law regulating innumerable communal networks varying in size and scope (intra-national, national, transnational).

4. CHALLENGES FROM LEGAL PLURALISM AND TRANSNATIONAL LAW

If the concept of society is problematic for sociology of law, perhaps the concept of law is also problematic. Sociology of law has long assumed that ‘law’ means state law. It is well-known that when Ehrlich introduced the concept of living law he failed to indicate clearly in what sense it should be thought of specifically as law. His concept of law remains very unclear²¹ and Franz Neumann complained of the ‘entire lack of a genuine legal theory’ in Ehrlich’s sociology of law.²² Ultimately the typical juristic (state) model of law lies behind much of his thinking, as behind most research in sociology of law since his time.

Sociology of law is increasingly faced with the necessity of recognising that state law is not the only kind of law that it must address and that the normal condition in the contemporary world is one of *legal pluralism* – the co-existence or conflict of distinct legal regimes purporting to regulate the same social space. The concept of legal pluralism has been present in sociology of law from its earliest phases, emphasising the existence of many forms of law other than the law of the state.²³ Sometimes it has been emphasised that state law itself should not be seen as a single legal regime.²⁴ Indeed, legal ‘plurality’ usually exists in some form, even in what lawyers would recognise as highly integrated legal systems, and is dealt with by normal juristic methods.

However, relations between, for example, European Union law and EU member states’ law or between EU law and World Trade Organisation law are not always merely routine interpretive matters but can often provoke debate about the fundamental nature of the legal

²¹ R. Cotterrell, ‘Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies’, in M. Hertogh ed, *Living Law: Reconsidering Eugen Ehrlich* (2008) 75-94, at 88-93.

²² F. L. Neumann, Book review (1937-8) 43 *American Journal of Sociology* 351-3, at 353.

²³ See e.g. R. Cotterrell, *The Sociology of Law: An Introduction*, 2nd edn (1992) 39-40.

²⁴ Different parts of the state apparatus may create regulation independently, and interpret state law differentially: see e.g. J. Dalberg-Larsen, *The Unity of Law: An Illusion?* (2000) 103-14. This plurality may remain unless mechanisms are available, and steps taken, to identify it and select a final ‘official’ legal position.

regimes involved. And the question of how to handle the relations of state and international legal systems operating in the same social spaces has become more acute. This is because international law (i) has sought greater ‘independent’ authority, less easily subsumed into state authority, for example via assertions of *ius cogens*, (ii) has become more prominent in the regulatory landscape by developing in many new or newly significant doctrinal fields (such as human rights, trade and finance, environment and intellectual property), and (iii) now sometimes (as with international criminal law) addresses directly the citizens of particular states. Further, international law has increasingly been seen as fragmented into a diversity of legal regimes whose relations are sometimes unclear.

Beyond all of this, many further dimensions of regulatory plurality are now widely recognised by Western legal sociologists and an increasing number of sociologically-oriented lawyers. Much regulation created in (often transnational) networks of interaction – such as merchant communities (*lex mercatoria*), corporate groups, industries, financial systems, internet developers, ‘private’ NGO movements, religious communities, or sports organisations – has been shown empirically to be at least as practically powerful as much juristically recognised law, and no less authoritative for those subject to it. Much is characterised by unions of primary and secondary rules, such as H. L. A. Hart associated with a legal system.²⁵ Some lawyers, indeed, speak of ‘transnational private law’ to include at least some regulation created wholly or partly in these kinds of communal networks.

The result of all these developments²⁶ is to challenge any idea that law can now be equated with state law. So, for sociology of law, as for juristic thought, the question of the concept of law becomes significant. There is a problem of deciding what should be taken to be ‘law’ for the purposes of sociology of law. It is no longer adequate to assume that law means what the state produces and authorises as legal regulation through its legislature(s) and courts. Many Western writers have referred to the contemporary legal landscape as one of ‘global legal pluralism’.²⁷ The issue is not merely to decide as a conceptual matter what is to be recognised as law for the purposes of research; it is also to consider how to assess the authority of the

²⁵ Hart, *The Concept of Law*, 2nd edn (1994).

²⁶ For a valuable survey of the variety of forms of global governance that are now developing outside or alongside state law see A.-J. Arnaud, *La gouvernance: Un outil de participation* (2014).

²⁷ Among much diverse literature, see e.g. P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (2012).

numerous different kinds of regulation that now exist, addressing individuals, organisations, corporations and states in an era of globalisation and of the transnational operation of law.

If the state's practical monopoly of law is being challenged by global legal pluralism, it is important also to note briefly some other considerations that alter perceptions of the state's capacity to regulate through law. Even in many strong, stable, representative democracies this capacity is weakened in ways that legal sociologists should study. To take a few examples: private forces (corporate interests, mass media pressure, corruption) sometimes influence or constrain the practical exercise of state authority; tax evasion and avoidance, and misuse of public finances, can diminish financial resources available to make the exercise of state authority effective; and resources of expertise available to parts of the 'private sector' may be superior to those on which public regulatory agencies can draw.

Equally significant is the point that a state's practical regulatory capacity often depends on its 'external' strength in the world, that is, its strength relative to other states. Globalisation pressures limit freedom of action for all but the most powerful states, often directly affecting the content of legislation, for example in areas of economic policy. Official or unofficial extraterritorial law enforcement by some states affects the practical legal authority of others over their citizens. Extradition provisions can sometimes have similar effects, in effect handing over the exercise of legal authority in particular cases to another state. Some states are able even to exercise punitive force in others without permission, including the power (e.g. through clandestine raids or use of remote technology) to execute or seize residents of weaker states in the territory of those states. In this way they undermine weaker states' capacity to assert their own authority within their borders. And as is well known, disparities of power between states are reflected in the shape, use and effects of international law,²⁸ so that its legitimacy as an extension of the political authority of states, founded on their consent as an international community, is often doubted.

In the light of these conditions any idea that sociology of law can treat the state as a given – as a law-making agency that does not, itself, require much analysis – is hard to sustain. Globalisation not only encourages the growth of new kinds of regulation outside the control of states as autonomous law-makers. It also directs attention to the diversity of states as

²⁸ See e.g. N. Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369-408.

regulators and the fact that their law-making and law-enforcing capacities are powerfully shaped by both ‘internal’ and ‘external’ pressures.

5. CONCLUSION

If we think of sociology of law’s time-honoured focus as having been ‘law and society’, it is necessary to recognise that both elements in this focus (both ‘law’ and ‘society’) have been destabilised and sociology of law can no longer operate with many assumptions on the basis of which much of its research in past decades has been conducted. As has been seen, the concept of society may be much less useful than it has been assumed to be in the past because it is becoming harder to think of law as relating to a single national political society in which culture can be assumed to be uniform. As globalisation progresses and associated movements of populations around the world become normal phenomena, an intensification of cultural communication is occurring. National political societies that formerly seemed to be relatively homogeneous now are forced to recognise the considerable cultural diversity existing within them, as well as between them.

This cultural diversity can be represented theoretically in sociology of law by using ideal types of social relations of community and by emphasising the innumerable ways in which these types of community can be combined in groups and networks. This approach highlights the variety of different ways in which cultural bonds are maintained – especially through shared beliefs and ultimate values, through common economic interests and projects, through tradition, customs and co-existence in a shared environment, and through emotional attachments and allegiances.

The concept of law – the other pole of ‘law and society’ – is also coming to seem something that can no longer be taken for granted in Western sociology of law. Law is no longer just the law of the state, but a huge amount of research on sociology of law has focused on the workings of state law – its regulatory successes and (more often) failures. Even if legal sociologists retain this focus there is a need to devote much attention to the way various factors both ‘internal’ (arising in the national political society) and ‘external’ (often associated with globalisation and international relations) affect the state’s capacities as a regulator. But there is also a need for a sophisticated sociology of international law and a

sociological focus on the many forms of regulation that address individuals, groups and corporations across national boundaries and are not limited by the borders of state jurisdiction. The term transnational law is now widely used to refer to these latter categories of regulation. In this brief paper it is not possible to discuss the many complexities and challenges for research that arise with this expanded understanding of the scope of law. Suffice it to say that they are setting new agendas for Western sociology of law, as for jurists.

It is likely that these developments will encourage increasing interaction between jurists and legal sociologists. Empirical studies in sociology of law will be increasingly needed by jurists to map out the emerging new forms of regulation and to study the networks of community in which these forms of regulation are created or which they purport to address. At the same time, sociology of law will need to pay more attention than it has in past decades to the concept of law. It is no longer possible to leave the question ‘What is law?’ to the theorising of legal philosophers; it has become a practical matter. Sociology of law has more opportunity than at any time since Ehrlich and Weber to define for itself its field. It can no longer merely accept juristic understandings of law because these are beginning to be in flux. Sociology of law can help to shape those understandings through its researches, at the same time as it observes and benefits from juristic efforts to impose normative order on the new forms of regulation that are proliferating in the shadow of globalisation.

[September 2015]
